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In the Supreme Court of the United States

OCTOBER TERM, 1986

THOMAS ANTHONY MARICLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Petitioner challenges the validity of two search warrants and the execution of the searches authorized by those warrants.

1. Petitioner was indicted in the United States District Court for the Middle District of Florida and charged with possessing and manufacturing phencyclidine (PCP), possessing piperidine with intent to manufacture phencyclidine, and possessing marijuana with intent to distribute it, all in violation of 21 U.S.C. (& Supp. II) 841. Following the partial denial of his motion to suppress evidence, petitioner pleaded guilty to all four counts in the indictment, reserving the right to appeal the district court's suppression ruling. He was sentenced to a total of 11 years' imprisonment.

On February 19, 1985, local sheriffs arrested two juveniles for possession of marijuana. In sworn statements, the juveniles informed the authorities that they had stolen the marijuana from a barn in Osteen, Florida, where they had observed marijuana plants growing under sun lamps. The juveniles also stated that they had seen machine guns and ammunition in a shed adjoining the barn, and had observed more guns, ammunition, and a laboratory in a mobile home nearby. In addition, the juveniles informed the officers that they had seen several people on the property on other occasions, and were aware that an armed guard had been hired to protect the property. 1 Tr. 134-135; Pet. App. B15-B22. The next morning, an agent of the Drug Enforcement Administration (DEA) accompanied the juveniles to the Osteen property and confirmed their description of the layout, noting three vehicles nearby (1 Tr. 35-39).

Later on February 20, a state judge issued a warrant authorizing a search for marijuana in the Osteen barn and adjoining smaller buildings (Pet. App. B1-B5). Because they had been informed that several persons and a substantial quantity of arms might be in the area, the officers executing the warrant determined to make a protective sweep of the property. As the agents approached the mobile home, they detected a strong smell of ether; they accordingly entered the trailer, where they found petitioner and an operational laboratory. With petitioner's help, the agents shut down the laboratory to prevent an explosion. Agents subsequently reentered the mobile home to shut off its electricity and to ventilate it. 1 Tr. 146-147, 222-225.

The following day, law enforcement agents obtained a warrant to search the mobile home for phencyclidine and cocaine (Pet. App. C1-C6). The warrant affidavit incorporated the statements of the juvenile informants, set forth the observations of the officers who had entered the trailer on February 20, and noted that the presence of ether was

indicative of cocaine manufacture (*id.* at C7-C26). A search of the mobile home revealed laboratory glassware, chemistry books, chemistry notes, and phencyclidine (1 Tr. 93-103).

The district court subsequently denied petitioner's motion to suppress the evidence found in the barn and mobile home.[1] The court concluded that the protective sweep was justified both to ascertain whether any persons were present in the area and to forestall an explosion of the ether. The court also held that the warrants were supported by probable cause. 2 Tr. 65-67. The court of appeals affirmed without opinion (Pet. App. A1-A2).

2. Petitioner's fact-bound contentions that the February 20 warrant lacked probable cause (Pet. 13) and that the protective sweep undertaken by law enforcement agents was unjustified (*id.* at 13-14) are without merit and do not warrant this Court's consideration. The affidavit supporting the February 20 warrant contained ample support for the conclusion that a search would reveal evidence of a crime: the two juveniles reported seeing marijuana, a laboratory, guns, and ammunition. Their accounts, moreover, were corroborated by their possession of a large quantity of marijuana, as well as by the DEA agent's observations on the scene. Cf. *Illinois* v. *Gates*, 462 U.S. 213 (1983).

On the record here, the agents' protective sweep similarly was justified. The juveniles had seen machine guns and ammunition in the shed and mobile home, they had seen

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[1]The court granted petitioner's motion to suppress evidence obtained during warrantless searches of an automobile and U-Haul trailer located nearby (2 Tr. 29-30).

[2]Petitioner's discussion (Pet. 12) of the good faith exception to the warrant requirement is beside the point, because the warrants here were issued on probable cause.

more than one person on the property, and they had knowledge that a security guard had been stationed in the area. On the morning of the search, a DEA agent had seen three vehicles on the property, indicating that there might be several people nearby. And the agents had smelled ether, an explosive gas, emanating from the mobile home. The district court therefore properly concluded that the protective sweep was a reasonable response to dangers faced by agents executing the warrant.

Petitioner also is incorrect in asserting (Pet. 13-14) a conflict in the circuits on this point. While courts have held protective sweeps improper in the absence of any indication that potentially dangerous people were in the area (see, *e.g.*, *United States* v. *Hatcher*, 680 F.2d 438, 444 (6th Cir. 1982); *United States* v. *Gamble*, 473 F.2d 1274, 1277 (7th Cir. 1973); *United States* v. *Spetz*, 721 F.2d 1457, 1465-1467 (9th Cir. 1983)), none of the cases cited by petitioner suggests that a cursory check is improper when necessary to assure the safety of the officers executing the warrant. To the contrary, several of those decisions expressly recognize that protective sweeps are warranted in such circumstances. See, *e.g.*, *United States* v. *Kolodziej*, 706 F.2d 590, 596 (5th Cir. 1983); *Spetz*, 721 F.2d at 1465.

Finally, petitioner's factual challenges to the adequacy of the February 21 warrant (Pet. 15-18) are without merit. Given the observations of the agents on February 20, as well as the strong smell of ether in and near the mobile home, petitioner's suggestion that the warrant lacked probable cause is frivolous.[3] And petitioner's contention that the agents conducted a general search of the mobile home is

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[3]As noted above, the protective search of the mobile home on February 20 was reasonable; observations made by the agents in conducting that search accordingly could be used in obtaining the February 21 warrant.

belied by the record. The warrant authorized a search for phencylidine or cocaine, "lab apparatus," "all chemicals and/or agents," other controlled substances, and all documents relating to the laboratory (Pet. App. C17). Those were precisely the items searched for and seized.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

SEPTEMBER 1986